In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 946

AAA CON DRIVERS EXCHANGE, INC., ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B–1—B–11) is reported at 340 F. 2d 820. The opinion of the district court is reported at 234 F. Supp. 66.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1965, and the petition for a writ of certiorari was filed on March 3, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether petitioners' business of providing the transportation of privately-owned passenger cars, in

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the course of which they hold themselves out to the public as providing drivers to transport automobiles to or from any place in the country and fix the rates to be paid by the owner, as well as other substantial terms of the "driveaway" service, constitutes "transportation * * * for compensation" subject to economic regulation under the Interstate Commerce Act.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act, as amended, 49 U.S.C. 1, *et seq.*, are set out in the petition (Pet. App. A–1—A–3).

STATEMENT

The facts are not in dispute. Petitioners operate what is known as a "driveaway" transportation service: for a fee they arrange to have persons wanting to travel to distant destinations drive the automobiles of others who wish to have their cars transported to such destinations. Approximately 1200 movements of automobiles per year are accomplished by petitioners (Pet. App. B–7).

In conducting their business, petitioners advertise in the newspapers and in the Manhattan Telephone Directory. Typical advertisements represents that "Certified and Bonded Drivers" are "Available to Drive Your Car to and from Anywhere in the U.S.A." with "Low Rates", "Bonded Drivers", "Door to Door Service" and "Branch Offices" (Pet. App. B–2—B–3). When an inquiry is received from an automobile owner, petitioners inform him that they will attempt to obtain a driver, and strike a bargain as to the

amount the owner will pay (Pet. App. B–3). Inquiries are also solicited and received from persons seeking transportation. Petitioners inform the prospective driver what the owner will pay him and, what he, in turn, must pay petitioners (Pet. App. B–3).

In a standard form letter sent to inquiring automobile owners, petitioners offer to provide "a BONDED, LICENSED, and REGISTERED DRIVER, who will follow your instructions and deliver your car to any point in the United States" (Pet. App. B–3). If the owner requests it, petitioners furnish an application for trip liability and property insurance, supplied by an insurance company specified by petitioners (Pet. App. B–5). In addition, petitioner sends the owner an "Automobile Ownership Authorization Order", which authorizes petitioners to process a driver to drive the car "as per * * * [owner's] instructions" (Pet. App. B–3).

For a prospective driver, petitioners utilize a "Driver's Application for Casual and Reciprocal Transportation," which requests personal information concerning the driver, including a photograph and thumb print (Pet. App. B–4). The driver certifies that he is not an agent or employee of petitioner, but is a bona fide traveler seeking casual transportation (Pet. App. B–4). If petitioners are satisfied with the driver, he is given a "Driver's Conditional Receipt" and two copies of an "In Transit Permit" to be completed by the owner and driver. The "permit" fixes the terms of the relationship between the owner and the driver (Pet. App. B–4, B–5).

Pursuant to Section 222(b) of the Motor Carrier Act (49 U.S.C. 322(b)), the Interstate Commerce Commission filed a complaint in the district court seeking to enjoin petitioners from engaging in what were alleged to be for-hire transportation services without obtaining operating authority from the Commission. Admitting that they were engaged in the "driveaway" operations as described in the complaint, petitioners denied that their business was conducted in such a manner as to constitute "for-hire transportation" within the meaning of the Act. The district court agreed with petitioners and dismissed the complaint, taking the view that petitioners' business was one of merely bringing together car owners and casual travelers seeking cheap transportation, without continuing interest on the part of petitioners in the transportation transaction (234 F. Supp. at 72–73). The court of appeals unanimously reversed, holding that, in view of the "broad remedial purpose" of the Motor Carrier Act (Pet. App. B–7), "the Commission rationally could and its decisions show us that it would conclude that, after all the shearing was over, [petitioners] still led [their] customers to believe that [they], and not simply the drivers, [were] getting their cars from one place to another and that [petitioners were] not acting merely as an employment agency" (Pet. App. B–10).

ARGUMENT

Petitioners do not contend that a "driveway" transportation service is immune from economic regulation as a common carrier because the only thing being transported is a motor vehicle furnishing its own mo-

tive power. Nor do they claim immunity on the ground that the automobile is not being transported for sale, but merely for the convenience of its owner.[1] Petitioners' argument is, rather, that their "function is not transportation" and that their driveaway "operation is similar to that of an employment agency" (Pet. 5–6). The contention is based on two erroneous factual assumptions specifically rejected by the court of appeals, namely, that petitioners do not hold themselves out to the public as providing a complete transportation service and that they exercise no control over the terms of the relationship between the owner and the driver and have no interest in the transportation *qua* transportation.

First, the court of appeals held that the definition of "common carrier" embodied in Section 203(a)(14) of the Act (Pet. App. A–1) stresses, not what a person does, but what he holds himself out to do. "Holding out is important," the court stated (Pet. App. B–8), "not only because of the significance historically given to it but because, even if the performance does not match the promise, the latter may have the adverse

[1] As the court of appeals pointed out (Pet. App. B–6–7), such arguments have been foreclosed by established precedents dating back almost to the inception of the Act. *E.g., Fleming Common Carrier Application*, 8 M.C.C. 469, modified, *Alton R. Co.* v. *United States*, 36 F. Supp. 898 (E.D. Mich.), affirmed, 315 U.S. 15; *Interstate Commerce Commission* v. *Interstate Auto Shippers, Inc.*, 214 F. Supp. 473 (S.D.N.Y.), affirmed, 323 F. 2d 367 (C.A. 2). The court below also noted, contrary to petitioners' present assertions (Pet. 8–9), that the Commission has not been inconsistent in its treatment of driveaway operations such as those involved in the instant case (see Pet. App. B–9).

effect on 'existing carriers upon whom the bulk of shippers must depend for access to market' which underlies the requirement of a certificate or permit. *United States* v. *Drum*, *supra*, 368 U.S. at 374–75."[2] Canvassing the facts, the court held that petitioners' advertisements, far from representing AAA Con's function as that of a mere intermediary between the owner and the driver (Pet. App. B–8) as petitioners claim (Pet. 5–6), plainly were intended to, and indeed did, give the impression that petitioners would fix and collect the rates, furnish and pay the driver, and otherwise undertake to transport the vehicle from one place to another.

Moreover, the court held that, aside from petitioners' "holding out" in their advertisements, the actual facts of the operation are "likewise irreconcilable with AAA Con's image of itself [as a mere employment agency]" (Pet. App. B–8). Thus, the court stressed, petitioners, not the driver, fix the rate the owner must pay for the transportation (*ibid.*)[3] and set "all the terms of the relationship; the driver and the owner do not make their own arrangements, as would normally be done between employer and employee" (*ibid.*). The court concluded that, while petitioners had "made a more expert endeavor

[2] As already indicated (Statement, *supra*, p. 2), petitioners move some 1200 automobiles annually, which represents a substantial diversion from driveaway operators holding certificates or permits from the Commission.

[3] They, therefore, have "every bit as much interest in the transportation payments as if [they] collected these from the owners and paid the drivers out of them * * *" (Pet. App. B–8).

to take [themselves] out of the reach of the statute" than had most other driveaway services certificated by the Commission (Pet. App. B–10), "[w]e cannot say that one who holds himself out and acts as AAA Con has done has effectively placed himself beyond a rational construction of the prohibitory language of the statute, which Congress entrusted the Commission to administer" (Pet. App. B–8).

In short, the court of appeals held that persons who continuously, as a business, hold themselves out as ready and willing to provide drivers to transport the vehicles of others in a driveaway operation, have assumed the characteristic burdens of the transportation business and are subject to regulation by the Commission.[4] That ruling is wholly in accord with the decisions of this and other Courts which have considered the same or similar problems. See, *e.g.*, *United States* v. *Drum*, 368 U.S. 370, 375; *Interstate Commerce Commission* v. *Interstate Auto Shippers*, 214 F. Supp. 473 (S.D.N.Y.), affirmed, 323 F. 2d 367 (C.A. 2); *Interstate Commerce Commission* v. *Dudgeon*, 213 F. Supp. 710 (S.D. Calif.), affirmed (C.A. 9; unreported), certiorari denied, 372 U.S. 960.[5]

[4] Petitioners also assert (Pet. 5–6) that the transportation involved here is "casual, occasional, or reciprocal" within the meaning of the exception contained in Section 203(b)(9) of the Act and is therefore immune from regulation. "But," as the court below held (Pet. App. B–7), "there was nothing 'casual, occasional, or reciprocal' in AAA Con's operation" and the exception referred to is inapplicable since petitioners are "engaged in for-hire transportation", subject to the requirements of the Act.

[5] There is no conflict between the present case and *B & C Truck Leasing, Inc.* v. *Interstate Commerce Commission*, 283

Finally, petitioners assert (Pet. 11–14) that the economic burdens of Commission regulation of their driveaway transportation service will violate their rights under the Fifth Amendment. The argument is wholly without merit. It is well settled that necessary modification of business practices to conform with reasonable regulatory requirements designed to advance the public interest do not violate constitutional rights. *E.g., Virginian Ry. Co.* v. *System Federation,* 300 U.S. 515, 558. In any event, the Commission is aware that persons operating driveaway services such as petitioners will face certain problems in complying with applicable regulations.* It also recognizes that these problems are not insurmountable in view of the successful past operations of a large number of such certificated carriers offering comparable services. One example may be seen in *Bell Transportation Co.,* 96 M.C.C. 264, where a certificate of public convenience and necessity was issued for driveaway operations virtually identical to those involved here. Compliance with applicable Commission regulations (assuming they qualify for a certificate) will merely place peti-

F. 2d 163, 165 (C.A. 10). The dictum referred to by petitioners (Pet. 7) is to the effect that one "*engaged solely*" in providing drivers, "*without more*," is not required to obtain authority from the Commission (emphasis added). In the present case, however, the court specifically found that petitioners have not been engaged solely in furnishing drivers (Pet. App. B–10).

* "Presumably the vehicles involved here would weigh less than 10,000 pounds and they would have no more than two axles, so their operation would not be subject to two of the most important aspects of the safety regulations applicable to larger vehicles—namely, the hours-of service and daily-log requirements. 49 CFR 195.3(c) and 195.8(t)(2)" (*Bell Transportation Co.*, 96 M.C.C. at 270).

tioners in the same position as their certificated competitors whose traffic has been diverted by petitioners' past operations.

CONCLUSION

The decision below is correct and no question calling for further review is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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